No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

MILTON KNAPP,

Petitioner.

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents.

REPLY BRIEF FOR PETITIONER.

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Topics of Respondents' Arguments.

Statement.

Examination of Respondents' brief shows that argumentation is grouped around three propositions which may be stated, grossly, as follows:

1. New York's immunity statutes fully discharge New York's obligation to petitioner, if any, under the Fifth Amendment under a dual sovereignty (R. B., pp. 12-16).

2. A peril under the laws of a different sovereignty is so remote that it may be disregarded (R. B., pp. 16-19).

3. New York's action is not controlled by the Fifth Amendment (R. B., pp. 19-24).

This reply brief will deal with the propositions in the order of their gravity, viz:

1. Application of the Fifth Amendment.

2. New York's Immunity Statutes; Dual Sovereignty.

3. Proximity of the Peril.

ARGUMENT.

1. Application of the Fifth Amendment (pp. 19-24)

A. Relationship of Supremacy Clause. (pp. 19-20)

Respondent's counsel begins his argument by stating an "axiom" that

> ". . . [the Fifth] Amendment, as a part of the Bill of Rights, is not applicable to or controlling upon the states."

from which he derives the conclusion that the only claim of constitutional deprivation that can be made is a claim under the Fourteenth Amendment.

The "axiom" which forms the major premise is stated in terms more comprehensive than warranted by the decided cases, and the conclusion is faulty because it fails to exhaust the possibilities.

Turning first to the "axiom", there have been two views urged concerning the application of the Federal Bill of Rights to the states. One of these regards the Bill as furnishing to the citizen as against state action, whether or not solely concerned with the purely domestic affairs of the state, protections precisely in accord with the enumerated items of the Bill of Rights. That is to say that the states are bound to parallel in substance and procedural detail,

in all cases, the strictures of the Bill of Rights. This view of parallelism was asserted without success both before[1] and after[2] the advent of the Fourteenth Amendment.

Less comprehensive than the view of parallelism is the notion that in a divided sovereignty, the allocation of certain functions to one or the other government produces a corresponding division of the rights and obligations of the citizen; the right associated with a particular function following that function and that the Bill of Rights protects the citizen in such of his activities as relate to the functions assigned to the Federal Government.[2a]

This functional view is the view sustained in *Crandall* v. *Nevada*[3] against state action in the form of a taxing act restrictive of passenger transit out of Nevada. Several Federal functions were involved: among them, one protected by the First Amendment, viz. the right "to petition the [Federal] Government".

In the very decision which rejected the view of parallelism, sought to be vitalized under the Fourteenth Amend-

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[1] *Barron* v. *Baltimore*, 7 Pet. 243.

[2] Slaughterhouse cases 16 Wall. 36.

[2a] A still more restricted view was expressed in *Maxwell* v. *Dow*, 176 U. S. 581 i.e. that only strict rights of citizenship (excluding rights applicable to all persons) are comprehended by the "privileges and immunities" clause. This restricted view appears in no other place and it would seem to contradict both the definition of privileges and immunities given in the *Slaughterhouse* cases and the examination of them in that decision. This restricted view, so far as this counsel can see, protects only such rights as the right to run for Congress. It would seem quite incongruous for the framers of the Fourteenth Amendment to have used the words in any sense less than that of the full rights of the citizen comprehending not only those rights given to non-citizens but also those depending on the citizenship status as such. The language is aggregative or it is empty.

[3] 6 Wall. 35 (1868). The case was not decided under the Fourteenth Amendment, but it was later cited in the Slaughterhouse Cases as partially enumerative of 'privileges and immunities of citizens of the United States.'

ment, the *Slaughterhouse Cases*,[4] there is an enumeration of rights "which no state can abridge" founded upon the functional view; rights which "owe their existence to the federal government, its national character, its Constitution or its laws."

> "One of these is well described in the case of Crandall *v.* Nevada, 6 Wall. 36. It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several states.' And quoting from the language of Chief Justice Taney in another case, it is said 'that for all the great purposes for which the federal government was established, we are one people, with one common country, we are all citizens of the United States;' and it is, as such citizens, that their rights are supported in this court in Crandall *v.* Nevada."
>
> "Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the

[4] 16 Wall. 36.

territory of the several states, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, * * *."

Crandall v. *Nevada* refers aptly to these rights as

"* * * independent of the will of any state * * *"

Now, in the case at bar, Petitioner is a functionary in interstate commerce;[5] Congress has the function of regulating that commerce, and has exercised it by making certain conduct a crime within the cognizance of the federal judiciary, which by the Constitution has the function of hearing and determining the same. Because as a functionary in commerce he is exposed to federal criminal prosecution, the Fifth Amendment has thrown about him a cordon of protection in any federal prosecution which may result; it has provided *inter alia* that in such case he may not be compelled to be a witness against himself. This protection exists because he engaged in a function, commerce, within the ambit of federal control, and thereby exposed himself to federal regulation. Clearly his primary right springs out of the "national character", "the Constitution" and "the laws" not of New York, but of the United States.

Respondent's "axiom" therefore is supportable only to the extent that it embraces the rejected view of parallelism;

[5] Second Employees' Liability Cases 233 U. S. 1.

the states are not furnished a ready made Bill of Rights for application to matters of their several domestic concerns. The "axiom" is insupportable to the extent that it embraces the accepted view of functionalism; the states are bound by the Bill of Rights where the particular right of the individual hinges upon his relationship to the Federal Government. This latter is true, it may be noted, whether or not the right involves "due process"; the right need not be "fundamental", it need only be federal.

Even less can be said in favor of Respondent's conclusion than can be said in favor of his "axiomatic" premise. For it is obvious that the Fourteenth Amendment does not furnish the sole basis for control of state action in respect of the Bill of Rights; if a right is federal, the Supremacy Clause may also bear upon state action. Indeed, a popular criticism of the *Slaughterhouse Cases* was that the decision reduced the scope of the "privileges and immunities clause" so that it achieved nothing that would not have been achieved by the Supremacy Clause *ex proprio vigore*. Without exploring the abstract question of whether the two are co-terminous in effect, we may observe that a very large range of concomitance necessarily exists.[6]

It is true, of course, that not every item of the Federal Bill of Rights creates rights of a type with which the usual run of state action will interfere; this is so because the Bill is aimed primarily at control of federal agencies. But with those rights, suited as they are to the action of federal agencies, there can, under the Supremacy Clause, be no state interference.[7] If a state, for example, laid a

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[6] Cf. *Crandall* v. *Nevada*, 6 Wall. 35, which rested solely upon the Supremacy Clause and the reference in the *Slaughterhouse Cases* 16 Wall. 36, to the rights therein described as "privileges and immunities".

[7] *Lyon* v. *Mutual etc. Assn.*, 305 U. S. 484.

tax upon a demand for federal jury trial or attempted to make a federal offense unbailable or commanded those subpoenaed as witnesses on behalf of a defendant in a federal criminal trial to refrain from attending or testifying, there would be little doubt of the invalidity of the state's action, even if the Fourteenth Amendment had never been enacted. Otherwise, as was said of the Nullification Acts of South Carolina,

> "... a State would have nothing more to do than to declare an act a felony or misdemeanor, to nullify all the laws of the Union."[8]

And it would make no difference whether the citizen claimed under the Bill of Rights or under similar provisions elsewhere in the Constitution. Marshall Neagle, for example could not be denied the privilege of the writ of *habeas corpus* by California laws governing murder.[9]

Respondent's proposition that no item embraced in the Bill of Rights restricts state action unless it violates due process is, hence, a fallacy.

B. Due Process (pp. 20-21).

The Court will observe that Petitioner did not raise the issue of due process in the original brief. But it is now raised by Respondent with the assertion that that is the only route by which the action of New York in the case at bar can be controlled. Petitioner now feels free to meet the issue.

Respondents rely upon *Twining* v. *New Jersey*[10], *Adamson* v. *California*[11] and *Snyder* v. *Massachusetts*[12] to demon-

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[8] Statement on the Removal Act of 1833 by the chairman of the Judiciary, quoted from Tennessee and Davis 100 U. S. 257.

[9] *Ex Parte Neagle*, 135 U. S. 1.

[10] 291 U. S. 97.

[11] 332 U. S. 46.

[12] 211 U. S. 78.

strate that a question of self incrimination does not involve a question of due process. It may well be that not every question of self-incrimination involves a question of due process, a matter which neet not here be examined. None of the three cited cases, however, involved compulsion to testify; *Twining* and *Adamson* involved merely inferences drawn by prosecutors from refusal to testify and *Snyder* involved the absence of defendant during a jury view of the scene of the crime.

But in *Brown* v. *Mississippi*,[13] it was held that compulsion to confess a crime was a violation of due process, the compulsion applied in that case being physical torture. Thus it is established that compulsion to confess gives rise to a question of due process, and that question here devolves into an examination of whether the substitution of a judge who threatens imprisonment for a deputy sheriff who threatens with a belt buckle removes the case from the rules of due process.

Neither on principle nor on an historical basis can such a distinction be made. The compulsion here sought to be exercised from the judicial bench is not the mere social compulsion or employment detriment referred to in the *Ullman* case;[14] it is the command "confess or forfeit your liberty"! And while the place of confinement may be more (or less) enjoyable than the Tower of London, a question of due process can hardly hinge upon the place of confinement: "*aut imprisonetur*"[15] is a phrase of unlimited application.

Certainly the fact that the compulsion is applied by the judicial department rather than by the executive depart-

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[13] 297 U. S. 278.

[14] 350 U. S. 422.

[15] Magna Carta, Art. 39.

ment of the government renders it no more palatable.[16] The framers of the Fifth Amendment directed the self-incrimination provision primarily at judicial action, the form

> "No person • • • shall be compelled in any criminal case to be a witness against himself • • •"

bespeaks restraint upon the judiciary; the words "case" and "witness" are the language of judicial proceedings. Our political ancestors were much closer in time than we to the "oath *ex officio*", to the Court of High Commission and to proceedings *In Camera Stellata*—all judicial in character, and their language reflects their revulsion.

It is respectfully urged upon the Court that while peripheral applications of the self-incrimination rule—such as the inference to be drawn from the fact that a person proved guilty by evidence *aliunde* fails to take the stand in his own defense—may not constitute violations of due process, violation of the hard core of the doctrine—the actual application of compulsion to the discovery of undisclosed crime or to the discovery of the connection of an individual with a known crime, transgresses the "canons of decency and fairness"[17] which underlie the concept of due process.

New York's Grand Jury is seeking:

> "• • • to determine whether or not the crimes of conspiracy and bribery of labor officials and the crime of extortion have been committed • • •" (R. 15).

as part of

> "• • • a continuing investigation • • • to ferret out all instances of organized racketeering in connection with labor unions" (R. 16).

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[16] *Boyd* v. *U. S.*, 116 U. S. 616.

[17] *Adamson* v. *California*, 332 U. S. 46.

This is a criminal discovery proceeding. It seeks evidence by compulsion—the compulsion of imprisonment. Its compulsion is applied to force answers to questions directed to the conduct of the witness before it. That conduct, if the questions are answered affirmatively, is criminal conduct. It immunizes him against only part of the penal consequences of disclosure, leaving the balance of crimination standing. The remaining criminal consequences, though enforceable in federal tribunals, occur under a law as domestic to New York as any law passed by its own Legislature.[18] The tribunals in which the penal consequences are enforceable are within New York and under duty to act upon disclosure. Compulsion is being applied presently and directly to force a confession of a crime, the penal results of which have not been annulled; that is abhorrent to due process.

Respondent's counsel, concluding the "due process" phase of the argument offers two makeweights. In the first, (p. 22) the argument of remoteness is admixed with the due process argument to detract from Petitioners' position on the latter. It is sufficient answer to this to say that if the case at bar is a case of actual remoteness (a point discussed *post*) that in itself is sufficient to defeat Petitioner; whereas if it is not a case of remoteness, it does not detract from Petitioner's position. Admixture of the two arguments advances neither.

The second makeweight (pp. 22-24) deals with the supposed adverse effect of a determination in favor of Petitioner upon the administration of criminal justice in the states. First observing that the prosecutors of states are

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[18] *Brownsword v. Edwards*, 2 Ves. Sen. 243, 28 Eng. Rep. 157 "The general rule is that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical 'law of the land' or by common law or statute" At the time, 1750, the ecclesiastical courts were separate.

no worse off within the divided sovereignty that we enjoy than would be their counterparts within a monolithic sovereignty,[19] it is sufficient answer to say that Congress holds the key. Power to grant complete immunity exists, but it, along with many other powers has two depositories; the answer lies in accommodation between the depositories. As the soundest commentator on the subject puts it:[20]

> "The real cause of our departure from the true English tradition has been a strange concept of federalism that views nation and state as *rivals*. Almost all American judicial thinking seems to be couched in these terms. Australia, Canada, and India have avoided this mistake, and regard them, instead, as colleagues. It is they, not we, who seem to have heeded the warning of a great American, Alexander Hamilton, who in Number 82 of *The Federalist* insisted that 'the state governments and the national government, . . . are . . . kindred systems, . . . parts of One Whole.' Acceptance of such an approach should be helpful as we enter what should be an era of even greater intergovernmental cooperation."

2. New York's Immunity Statutes and Dual Sovereignty (pp. 12-16)

A. The Immunity Statutes (pp. 12-15)

The forepart of Respondent's point appears to be an attempt to draw Petitioner into an attack on the constitutionality of New York's immunity statutes. But Petitioner is not in any way affected in his claim here by New York's immunity laws. What he complains of is the complex of

[19] "The two together form one system of jurisprudence which constitutes the law of the land for the state . . ." *Claflin* v. *Houseman*, 93 U. S. 130, 136.

[20] J. A. C. Grant "Federalism and Self Incrimination", Part II, 5 UCLA L. Rev. 1, 25.

New York laws which, Respondents say, enables its Grand Jury to persist in its inquiry into whether he committed a federally cognizable crime to the point of disclosure under compulsion of imprisonment; the laws creating the court, vesting it with criminal jurisdiction, creating the Grand Jury, making it an appendage of the Court, granting power of subpoena and power to punish for contempt.

True, New York's immunity laws, if they were founded upon a Congressional grant of power (which they are not) would be material to this case. But, as they now stand, they neither grant the Petitioner protection against Federal prosecution nor do they rob him of any Federal right; they are simply ineffectual. Plaintiff's claim is not varied one iota by the presence or absence of these state immunity statutes. Hence they are immaterial.

B. Dual Sovereignty

Respondent's counsel has culled the phrase[21] "separate and distinct sovereignties" from *Abelman* v. *Booth*. But *Abelman* v. *Booth* is hardly the case on which to root the proposition that the judicial organs of a state may proceed without reference to rights claimed under the Federal Constitution. Therein the Wisconsin courts issued their writ of *habeas corpus* on behalf of a federal prisoner convicted in a Federal Court under the fugitive slave law and discharged him from the custody of the marshal. When this Court sought to review, the Wisconsin Supreme Court declined to make a return to the writ of error, and this Court, permitting the United States Attorney General to furnish an *alias* record, reversed, holding distinctly and clearly that the Wisconsin courts were bound to observe rights accruing under the Constitution and laws of the United States. The holding is a holding of federal

[21] 21 How. 506.

supremacy, more forceful because the Justices composing this Court at the time seemed to lean toward the "states rights" doctrine.

The courts of the states, so far from being independent of law stemming from the Federal Constitution are bound by it completely in the exercise of their ordinary jurisdiction. In the Second Employees Liability Cases,[22] holding that Connecticut courts could not decline jurisdiction of FELA cases on the ground that the abolition of the fellow servant rule was at variance with the public policy of Connecticut, the Court, through Mr. Justice Van Devanter said:

> "The suggestion that the Act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature and should be respected accordingly in the courts of the state."

Counsel for Respondents equates federal criminal liability with "foreign" criminal liability using the terms (p. 17) "foreign prosecution", "foreign statute" "foreign jurisdiction". Apposite is the language of *Claflin* v. *Houseman*:[23]

> "The laws of the United States are laws in the several states and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the

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[22] 223 U. S. 1.

[23] 93 U. S. 130.

several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty."

The "dual sovereignty" doctrine is not only founded upon fallacy, as demonstrated in the original brief; it is also an anomaly in that it is limited to the related fields of self-incrimination and double jeopardy and appears nowhere else in the jurisprudence of federal-state relationships. Even in these fields it is applied only when the claimant of the right stands in naked and direct reliance upon the Constitution itself; when his claim is fortified by a statute, dual sovereignty is forgotten and supremacy takes its place.[24]

The object of dividing the sovereignty between the state and the Nation was to

"... secure the Blessings of Liberty...."

Here the contention is that the blessings have been lost in the division. The "dual sovereignty" doctrine should be abandoned; the law of the United States is the law of all the states.

3. Proximity of the Peril.

Counsel for Respondents assert (p. 17) that the reality of the danger in this case is no greater than the reality of the danger in *Jack* v. *Kansas*.[25] The assertion ignores the vital difference between the coverage of the anti-trust laws and the coverage of the Taft-Hartley Act. The labor act creates a unitary status; one is either an employer "in an industry affecting commerce" or he is not; and an inquiry into payments to union officials necessarily involves him if he is. On the other hand, a purveyor may restrain trade

[24] Cf. *Adams* v. *Maryland*, 347 U. S. 179.

[25] 199 U. S. 372.

intrastate without restraining interstate trade and vice versa, and an inquiry limited, as in the *Jack* case, to subjects intrastate will produce no evidence usable under the Sherman Act.

Counsel for Respondents devote some space (pp. 17-19) to examining the matter alleged in the pleadings concerning the announced policy of cooperation between the United States Attorney and the New York District Attorney to stamp out labor corruption. Petitioner's counsel deems it unnecessary to comment on the argument, but is anxious that it not serve as the vehicle to direct the Court's attention from what should be the test in such a case as this.

The test of remoteness in the matter of federal crime where inquiry is pursued in a state court is precisely the same as the test for state-created offenses. Murder, arson, theft and violation of the Taft Hartley Act are all offences against New York law, and no reason for differentiating exists. It is unthinkable that a court should weigh the relative mental acumen of Federal prosecutors as compared to State prosecutors or the diligence and efficiency of the F. B. I. as compared with that of the state police.

A point is made that the Grand Jury proceedings are secret. This has never been recognized as a ground for compelling disclosure, and the following reasons exist why it is not a sufficient answer to Petitioner:

1. The Grand Jury findings, published in the form of indictment or information, would supply sufficient information to start a Federal investigation.

2. The questions in this case are already on the record.

3. If Petitioner answered, he would waive the privilege and could be compelled to answer in public in the resulting trial.

Conclusion.

The order under review should be reversed and the cause remanded for vacatur of the mandate of commitment.

Dated: New York, March 4, 1958.

Respectfully submitted,

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